



Our ref. : [2011] HKIEA P2

8 February 2011

Clerk to the Panel on Housing
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Hong Kong

By email : panel_h@legco.gov.hk

Dear Sirs,

Re : Submissions on the Icon affair and sanctions for 'misleading omissions'

Please see attached our views on the Icon affair which may be relevant to the agenda item 'Dissemination of misleading information on sale of residential properties'.

We also propose the introduction of a *misleading omissions* sanction for the protection of home buyers, though that may be outside the strict purview of the Panel on Housing.

Yours sincerely,

Aparna Sordi
President

c.c. Chairman, Estate Agents Authority

The Icon Fallacies -

That the developer's estate agent is to provide accurate 'information' to the buyer

A. Background

1. The Icon affair can be summarized in this Government statement¹ :

The Government is concerned about the complaints relating to the residential development at 38 Conduit Road. Various government agencies, including the Buildings Department (BD), the CC and EAA are following up the cases closely. The CC and EAA are examining the complaints regarding the development. In addition, the BD is following up on whether internal alteration works to convert the approved enclosed kitchen to an open kitchen have been carried out in the subject building...For alteration works to convert the approved enclosed kitchen to an open kitchen, even if this does not involve the structure of the building, such work may still contravene the building regulations (e.g. contravention of the fire safety requirements). BD will take immediate enforcement action against any new unauthorized building works under the Buildings Ordinance in accordance the prevailing enforcement policy.

2. Following the 28 January 2011 Legco Panel on Housing special meeting, the CEO of the Estate Agents Authority ('EAA') was reported to have made the following remarks in relation to the open kitchen issue (unfortunately a view apparently shared by Legco members on the Panel):²

'... as a general rule, agencies had the responsibility of providing accurate information to flat buyers. They should verify information provided by developers with other authoritative sources...'

3. In view that this popular sentiment is so diametrically opposed to what our training course has been teaching estate agency practitioners, it may benefit the public, practitioners and other trainers to have the matter openly discussed.

B. Fallacy I – that an opinion on the legality of the open kitchen is 'information'

(i) The obligation to provide information

¹ Para. 11 of the Transport and Housing Bureau's paper for the 28 January 2011 special meeting of Legco's Panel on Housing, ref. CB(1) 1184/10-11(01)

² South China Morning Post 29.1.2011

4. Under s. 36 of the *Estate Agents Ordinance* Cap. 511 ('EAO') an estate agent acting for the vendor is required to be in possession of certain prescribed information once he accepts the instruction to act. He is also required to provide such information to the purchaser by way of completing certain prescribed forms³. The 'information' are generally data concerning the property that he can obtain from public sources independently of the developer/vendor, such as age, user, saleable area etc.
5. For information that the estate agent cannot obtain from public sources, such as internal alterations made to the property or intended action by the incorporated owners etc., his duty is limited to asking the vendor to declare them. The vendor is not obliged to do so and there is nothing that the estate agent, whether acting for the vendor or the purchaser, can do to make the vendor to declare.
6. A purchaser's estate agent of course has the duty to promote and protect the purchaser's interests, but it is not necessary to discuss this issue here. Generally developers do not allow their estate agent to act for the purchaser, so usually the developer's estate agent owes no duty to the purchaser⁴.

(ii) Information to be distinguished from professional advice

7. Whether an open kitchen is lawful or not is not 'information' but professional advice. To determine whether an open kitchen is lawful or not, an estate agent first need to know the building laws relating to the subject, then he has to study the building plan and finally to apply his knowledge of the building law to the building plan *to form an opinion* about its legality. There is no public source that an estate agency can consult to get a 'lawful' or 'unlawful' answer the way that he can obtain information about property user or saleable area.
8. Two court cases may best illustrate this distinction : one concerning the duty of an estate agent regarding a *deed of gift*, the other regarding a stigmatized property.

³ Property Information Form (Form 1) and Vendor's Estate Agency Agreement (Form 3) of the *Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation* ('Practice Regulation'). Though strictly speaking these two forms do not apply to a developer sale, the distinction is of no significance for this discussion.

⁴ The estate agent is apparently single agent for the *Icon* developer, judging from its advertisement in the 15.1.2011 (p. 54) and 1.2.2011 (p. 49) issues of the *Squarefoot* magazine www.squarefoot.com.hk.

(a) Advice regarding title matter

9. In the first case⁵, the joint vendors wanted to sell the property they acquired by way of a deed of gift. The Court found that the vendors had assured the estate agent (who acted for both parties) that their (vendors') solicitors had said that the deed of gift involved just a change of name so it was alright to sell it. The purchaser sued to rescind the deal due to title defect caused by the deed of gift which the vendors conceded. However, the vendors sued the estate agent for failure of duty to protect them by not advising them of the title issue.
10. On the standard of knowledge expected of estate agents in Hong Kong, the Court said estate agents should not be expected to exercise care and skill over matters which they received no training.⁶
11. The Court absolved the estate agent's duty towards the vendors saying that there was no need for the estate agent to second guess the vendor's own legal advice.⁷

⁵ *Chiu Wai Ling v Chan Yau Chi and Anor* DCCJ 346/2001 - [http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=34953&QS=\(chiu%2Bwai%2Bling\)&TP=JU; \[1#7\]](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=34953&QS=(chiu%2Bwai%2Bling)&TP=JU; [1#7])

⁶ *Chiu Wai Ling* ibid para. 29-30

29. *(Vendors' counsel) tries to equate the standard to be expected from estate agents in Hong Kong with that of other professionals such as solicitors or valuers in England. However, I am of the view that such kind of comparative exercise is not appropriate. I understand that estate agent is now a regulated profession, and every estate agent in Hong Kong has to obtain a licence from the Estate Agents Authority before he can practise in such field. However, unless it can be shown that an estate agent, in order to obtain the necessary licence, has to receive the same kind of training as those received by other professionals such as solicitors or valuers, one should not impose the same kind of standard in the present case.*

30. *In my judgment, the degree of skill and care expected from estate agents in Hong Kong, which forms the basis of any duty owed by the (Estate Agent) to the (Vendors), cannot be extended to some areas that the estate agents have received no training. Unless estate agents are expected to possess in-depth knowledge of conveyancing law, including the legal implications of the provisions of the (Estate Duty Ordinance)...one should not impose a duty on them to question the accuracy of (Vendor 2's) representation. In particular, the (Estate Agent) understood that (Vendor 2's) assurance was given after consulting his lawyer. In such circumstances, unless the (Vendors) can show that an estate agent should have received training in this area, one should not expect (the Salespersons) to take further steps to verify the legal opinion given by a solicitor on title matter. Indeed, solicitors should be in the best position to express such opinion, and I see nothing wrong that the (Estate Agent) simply relied on such representation given by (Vendor 2).* (emphasis added)

⁷ *Chiu Wai Ling* ibid para. 31 - '... (Section 36 of the EAO) requires an estate agent to possess certain prescribed information relating to a property, whilst the (Code of Ethics) require an agent to keep informed of any laws and Government regulation relating to his practice. However, it is clear that the (Estate Agent) was not in breach of the said section 36 as it possessed all the relevant prescribed information about the Property. For the provisions of the Code of Ethics... I am of the view that the (Estate Agent) was not in breach of any such provisions. As I have mentioned above, such duty should not be extended to expect estate agent to have in-depth knowledge about conveyancing law and title

12. Shortly after that decision, *deed of gift* was covered in the EAA monograph *Encumbrances*, published July 2002, to advise estate agents of what to do when they encounter such a deed.

(b) Factual information

13. The second case concerns a stigmatized property.⁸ The purchaser, before signing the preliminary agreement, asked the salesperson (a dual agent) whether the property was 'clean', meaning whether it had any history of untoward incidents. The salesperson answered 'no' without checking. In fact the vendor's son had fallen from the balcony to his death some years ago.

14. The court held that the negative answer given by the estate agent was outside the scope of the vendor's authority, so the vendor was not liable for misrepresentation. However, while there was no evidence before the court that the estate agent ought to know of the tragic incident, he nonetheless had failed his duty towards the purchaser because, instead of disclaiming knowledge as he should, he gave a negative reply resulting in the purchaser suffering loss.

15. The court specifically distinguished this case from the above *deed of gift* case because what was expected of the estate agent here was not '*knowledge or experience on questions of law*', but the passing on of '*accurate and reliable information*' about the property concerned.⁹

(c) Who can give professional advice on the building layout?

16. If an estate agent is to tell an *Icon* purchaser whether an open kitchen is lawful or not, he is providing *professional advice*, not *information*. Can an estate agent give such advice?

matters. Indeed, there is an important proviso in the relevant provision of the Code of Ethics, which requires estate agent to provide service based on "knowledge, training, qualifications and experience" in real estate business. Hence, unless the (Vendors) can show that a reasonable estate agent, with the necessary training and qualification, should have taken further steps to verify the assurance given by (Vendor 2), or to advise the (Purchaser) to seek independent legal advice, the (Estate Agent) was not in breach of any duty owed to the (Vendors).

⁸ *Jopard Holdings Ltd v Ladfaith Ltd and Anor.* HCA 3775/2001; [2005] 1 HKLRD 317 -

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=43673&QS=%2B&TP-JU; [1#8]

⁹ *Ibid* para. 25

17. According to a 2002 report of the Law Reform Commission of Hong Kong, even solicitors cannot give advice on the internal layout!¹⁰ That is the realm of the surveyor or the *authorized person*. In *Chiu Wai Ling*, *ibid*, the Court has specifically warned against equating estate agents' training with that for solicitors or valuers.¹¹ Estate agents are not among the league of 'professional advisers'.¹²
18. A deed of gift to the Estate Duty Ordinance as much a title problem as an open kitchen is to the Building Ordinance. It is not reasonable to expect estate agents, under the present knowledge and training requirements set by EAA, to be able to verify the building plan prepared by the developer's authorized person when even the developer's solicitors need not bear such duty.

(C) Fallacy II – the developer's estate agent is to give advice to the purchaser

19. An agent (including an estate agent) owes duty to his principal only. In the *Icon* case, the estate agent owes duty only to the developer, not the purchaser. The estate agent professes ignorance about the illegality of the open kitchen. That appears a plausible explanation (see the Annex).
20. But knowledge or not, that does not matter. Even if the developer's estate agent was aware of the illegality, he could not tell the purchaser without the consent of the developer - an unrealistic scenario. If the estate agent was to go ahead regardless he would be breaching his duty to his principal, the developer.
21. The only option open to the estate agent in the circumstances would be to cease to act¹³. This is a fundamental principle of agency law, and EAA says so :
- 4. Duty of Confidentiality¹⁴**
- a. Owing to the fiduciary relationship between a principal and his agent, the agent shall not disclose any information concerning the principal or any confidential*

¹⁰ 'It has been suggested in Hong Kong that a vendor of second-hand property should provide a survey report of any refitting that might affect the internal structure of the premises. This has arisen from the judicial view that the vendor's solicitors should determine with the help of a surveyor whether the property incorporates any unauthorised building work. If there is any such work, the vendor can then qualify the title. This judicial view strengthens the argument for granting the purchaser a right to obtain a survey report at least in relation to illegal or unauthorised structures...' - Para. 3.28 Report on Local Completed Residential Properties, September 2002 – see www.hkiea.hk > Consumers > Archives.

¹¹ *Chiu Wai Ling* *ibid*, para. 29-30

¹² 'Professional adviser' in relation to the DMC and land lease may include surveyors, engineers, builders, bankers and lawyers, but not estate agents – para. 10.12 Report on Description of Flats on Sale April 1995, Law Reform Commission of Hong Kong – see www.hkiea.hk > Consumers > Archives.

¹³ [5#26]

¹⁴ Monograph Agency Law:(5) Agent's duties to principal under common law; [Red Bundle Mono p. 6]

information entrusted to him by the principal to any third party in the absence of the principal's consent...

d. Even if the agent has ceased to act for the principal, the agent should continue to keep confidential any information concerning the principal or any confidential information entrusted to him by the principal, unless the principal consents to disclosure or unless the information has ceased to be confidential.

Confidential information¹⁵

18. Sometimes, particularly where the estate agent is acting for both the vendor and the purchaser, situations may arise where there is a conflict between the duty of confidentiality owed to one client ...and the agent's duty to disclose all relevant information which may affect the interest of the other client ...Where the conflict cannot be satisfactorily resolved without compromising the interests of each of the parties, the estate agent should cease to act.

(emphasis added)

22. In a dual agency situation, the conflict is between loyalty to each of the clients. In a single agency situation, the conflict is between duty to the client and the estate agent's own conscience. The outcome is the same - the 'illegality' cannot be disclosed to the purchaser. Ceasing to act is the only option.
23. In general a single agent should be cautious in his communication with the other party for fear that an agency relationship may be formed with the other party by conduct in breach of total loyalty to the principal.
24. The above discussion can be summarized as follows :
 - a. the determination whether an open kitchen is legal or not would involve the provision of *professional advice*, not *information*;
 - b. estate agents are not trained to ascertain, and there is no obligation for them to verify, matters impinging on professional advice;
 - c. if the developer's estate agent is of the view that the open kitchen is illegal, he cannot tell the purchaser without the developer's consent. If the consent is not forthcoming, the only option open to him is to cease to act for the developer. He cannot then act for the purchaser;

¹⁵ *A Study Guide to Estate Agency Law and Practice*

Part 8 'Data Protection'; [SG p. 136]

- d. these general principles apply irrespective of the resourcefulness of the estate agent, i.e. whether big or small.

(D) Fallacy III – that property transactions are already adequately regulated

25. One may legitimately ask – what protection there is for the purchaser then? Only Legco can stop the buck passing¹⁶, but there is one more fallacy to clear.
26. In the recent Commerce, Industry and Tourism Branch ('CITB') consultation on protection for consumers against unfair trade practices, sanctions were proposed to outlaw, amongst others, *misleading omissions*. However, property transactions are excluded from the proposed enhanced *Trade Descriptions Ordinance* because it is said that there is protection already under the existing statutory regime, the Consent Scheme and REDA etc.¹⁷
27. The *Icon* affair perhaps is a timely wakening call. Unless the common law duty of confidentiality is abrogated by statute, estate agents for the developer/vendor will continue to be barred from disclosing matters which their conscience may suggest disclosure. Here we are not referring specifically to open kitchens the 'illegality' of which may be debatable, see Annex.
28. In terms of protection for consumers, there is no reason to differentiate between first sale and second hand sale. Without the *misleading omissions* sanctions, the purchaser may continue to suffer from concealments like property stigmas.
29. Take unnatural death as an example. There is no duty in law for the vendor to volunteer such information relating to his property, though he cannot tell a lie if the purchaser raises the question specifically¹⁸. Constrained by the duty of confidentiality, the vendor's estate agent cannot disclose it to the purchaser. Not all purchaser (or his estate agent) would ask the question, and as a result the purchaser may suffer from ignorance of such a piece of detrimental information so material to his decision to purchase.

¹⁶ As the next step, and to achieve uniformity, may be '20%' (the extra that the developer offers to buy back due to its inability to deliver the 'open kitchen') should be written into the *Law Amendment and Reform (Consolidation) Ordinance* as the standard remedy for contracts frustrated by illegality!

¹⁷ Para. 5.8, *Public Consultation Report on Legislation to Enhance Protection for Consumers Against Unfair Trade Practices* (January 2011), Commerce, Industry and Tourism Branch - [http://www.cedb.gov.hk/citb/doc/en/consultation/report-110120%20\(unfair%20trade%20practices\)%20eng%20\(Content\).pdf](http://www.cedb.gov.hk/citb/doc/en/consultation/report-110120%20(unfair%20trade%20practices)%20eng%20(Content).pdf)

¹⁸ *Jopard Holdings Ltd* *ibid*, para. 20

30. The remedy lies in legislating against *misleading and deceptive* conduct to displace the common law duty of confidentiality and impose a positive duty of disclosure. This is a reason why we embrace the more stringent Antipodean ethical standard.¹⁹

(E) Closing remarks - who to throw the stone?

31. The Icon affair reflects a litany of failures :

- a. Building Department – applying firewood age kitchen laws to the 21st Century;
- b. CITB – complacency in the present property regulatory regimes to the neglect of protection for consumers;
- c. Consumer Council – wise after the event. There is no advice on the need to check the building plan for open kitchen in its *Guide to Purchasing Properties*²⁰ or *Notes to Purchasers of First Hand Residential Properties*²¹, both joint publications with EAA
- d. Developer – self-evident;
- e. EAA – self-evident;
- f. Lands Department – long sufferance of the non-Consent Scheme;
- g. The Law Society of Hong Kong – it does not appear that they are interested in the role played by the purchasers’ solicitors;²²
- h. Legco – inadequate consumer protection in enacting the Estate Agents Ordinance etc., also being wise after the event;
- i. Regulators of professional advisers – the developer’s architect, engineer and surveyor all appear unscathed.

32. It is not the intention of this article to defend the *Icon* estate agent, an oligopoly. Just two weeks ago²³ we took it to task over the claim in its *Icon* advertisement that ‘*Our company is a dual agent acting for both the vendor and the purchaser when the purchaser purchases second hand properties and our company shall be*

¹⁹ Para. 6 *Professional Ethics* - see Practitioners’ page www.hkiea.hk

²⁰ <http://www.eaa.org.hk/consumers/doc/property.pdf>

²¹ <http://www.eaa.org.hk/publications/property pamphlet.pdf>

²² Though an appeal is posted to its 31.1.2011 Circular for members – ‘*Following the saga of the problem apartments at the Icon in Conduit Road, the Consumer Council has called on the assistance of the Law Society to advise its members to post a warning notice on the front page of the Sale and Purchase Agreement for Non-Consent Scheme developments to alert homebuyers. Our Property Committee is reviewing the issue. If members have any comment, please forward them to...*’.

²³ *Pitfalls of the 3-party Provisional Agreement for Sale and Purchase* – 27.1.2011 HKIEA CIPD seminar; see also our report *The Tripartite Provisional Agreement for Sale and Purchase – RIP* at Practitioners’ page www.hkiea.hk

*entitled to receive commission from both sides.*²⁴ That is a glaring distortion about the meaning of fiduciary duty, but only an unrelated side issue here.

33. We write because the estate agent could be a humble practitioner trying to earn a living selling new village houses in Pui O or Sai Kung who, despite having spent two arduous months trying to learn all she could to become a competent and honest property practitioner²⁵, may suddenly find herself hounded by the frenzy to find a scapegoat for all the endemic wrongs in the regulation of the property sector. The practitioner could be an Australian arranging a sale to a purchaser from, say, New Zealand, and an open kitchen would come so natural to both of them²⁶. There is ***absolutely nothing*** in any of the guidelines or literature reasonably accessible to practitioners that she could learn to avoid the blame²⁷.

34. The property sector should be regulated robustly, but fairly!

Stanley To
Honorary Researcher

Annex – writer’s personal email to the Hon. Mr. Lee Wing Tat dated 24.1.2011

Note - [] in footnotes are course manual references for the benefit of students

²⁴ *Squarefoot Magazine* January 15-31 2001, p. 54

²⁵ Our Property Practice Training Course is a 16-session course conducted in English taught by the writer, and he declares interest. There is no requirement to attend any training course to sit the qualifying examinations so the very act of spending the time (2 months) and money (\$10,000) on learning may say something about the students themselves.

²⁶ See the Annex

²⁷ *Chiu Wai Ling* *ibid*

Annex

From: Estate Agents Development Institute <ea.training@gmail.com>

Date: 2011/1/24

Subject: What do estate agents know about open kitchens?

To: ahtat@dphk.org

Dear Mr. Lee,

I'm in support of your campaign to improve protection for home purchasers, in particular those buying from developers.

However, I have certain reservation about the following phrase (highlighted) attributed to you as reported in the Hong Kong Economic Journal yesterday (22.1.2011) :

民主黨立法會議員李永達表示，發展商涉嫌不向屋宇署申請改圖則，又承諾協助業主改裝，加上地產代理不可能不知道改裝開放式廚房違法，故他認為，事件可能涉及發展商與地產代理串謀繞過屋宇署，業主被誤導機會很高。

I started conducting estate agency training courses in English in 2005, and the majority of my students are expatriates. On the issue of open kitchen, my comments are:

(i) it is not in the EAA training syllabus, and it will be a little too much to expect the average local estate agent to know that it is 'unlawful' prior to the ICON saga now before Legco. May be Centaline staff will know because they have in-house legal advisors, and they are experienced in first sale. I have not taught the subject specifically though I do cover it briefly in my course because there are court cases about the Fairview Park management applying for injunctions to ban owners from conversion to open kitchens. But that's for breach of the DMC (structural alteration) and not because of Building Department's action. In a modern high-rise building conversion to open kitchen may not involved the building structure;

(ii) to my expatriate students, it defies logic to ban open kitchen in Hong Kong. They live their whole life in homes with open kitchens;

(iii) I share the expat view. The attached picture (taken in 2008) shows my former

home in a high-rise building in Sydney. The sitting room, dining room and kitchen are just one combined open space. It has a gas stove located about 5 feet from the entrance (left of the fridge just outside the picture). I don't think the NSW government cares less about fire or building safety than the Hong Kong government.

With all the modern kitchens on display along Lockhart Road, some gas fired and some by induction, one might legitimate ask why are our building regulations so outdated as to deprive citizens of the right to enjoy modern living. Personally I think it is the medieval kitchen laws that force people to resort to less than legal means to do that what they can do legally elsewhere. May be it will be interesting to find out what greater danger citizens in Hong Kong have been exposed to in the past few weeks when temperate dropped to under 10 degree C - the ideal time to have hot pot at home (and not in the enclosed kitchen of course)!

Personally I think it will serve more purpose to focus on the main culprits in you Icon investigation than magnifying the open kitchen issue. What had the purchasers' solicitors done to protect the purchasers?

While I should not digress, I can't help showing you the 2005 Ming Pao article attached²⁸. Why can't people ride the Segway in Hong Kong when they are used as patrol vehicles by policemen in the States and even the Mainland? If Hong Kong government officials are in charge of world aviation, there would be no helicopters because, without wings, they do not comply with the legal definition of 'aeroplane'!

In another capacity I have made submissions to Legco on the Special Stamp Duty : CB(1)1063/10-11(01) <http://www.legco.gov.hk/yr10-11/english/bc/bc02/papers/bc020104cb1-1063-1-e.pdf>. I have expressed certain views on the present state of estate agency training and practice, in case you are interested.

Best regards,
Stanley To
Consultant

²⁸ Omitted here. The article reported that the Transport Department refused registration for the Segway because it did not comply with the definition of 'motor cycle' under the Road Traffic (Construction and Use) Regulation, Cap. 374.

Post-2000 high rise residential unit in Sydney - gas range, no sprinklers

